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IN THE
COURT OF APPEALS OF INDIANA

NANCY J. MCDONOUGH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0612-CV-725
	)	
SCOTT MCDONOUGH	)	
as Personal Representative of	)	
the estate of Charles McDonough,	)	
	)	
Appellees-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robyn L. Moberly, Judge
Cause No. 49D12-0407-CT-1393

December 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Nancy McDonough appeals the trial court's judgment in favor of the Estate of Charles McDonough (the "Estate"). On appeal, Nancy raises two issues, which we expand and restate as 1) whether the trial court properly entered judgment in favor of the Estate; 2) whether the trial court properly awarded prejudgment interest to the Estate; and 3) whether the trial court properly refused to award prejudgment interest to Nancy on her claims against the Estate. Although we conclude the trial court properly entered judgment in favor of the Estate and properly determined the Estate was entitled to a prejudgment interest award, we reverse and remand to the trial court with instructions to recalculate its judgment because Nancy also should have been awarded prejudgment interest on her claims against the Estate.

Facts and Procedural History

On September 14, 1990, Nancy purchased a home located at 8307 Mud Creek Road in Indianapolis (the "Residence") for $130,000. Nancy paid $26,000 as a down payment, which her mother, Eleanor Best, loaned to her, and secured the remainder of the purchase price with a mortgage. Because the Residence was in a state of disrepair, Nancy's father, George Best, agreed to perform substantial renovations, including removing and reframing the interior walls, replacing the electrical and plumbing systems, and installing new ceilings and floors. By May 1992, the Residence was in a suitable condition for Nancy to move in.

On December 22, 1992, Nancy and Charles McDonough were married. During the couple's marriage, and while they were living in the Residence, George continued with his renovations and also undertook an expansion project. By December 1998, George had completed most of the expansion project, which increased the Residence from one-story and

2,200 square feet to two stories and 4,500 square feet. On December 15, 1998, George wrote a letter to Nancy that listed the time he spent on the renovations and the expansion project, as well as the expenses he incurred. The letter also stated that the balance on the loan from Eleanor was $15,500 and that the total amount owed to George and Eleanor was $95,240 (the "Debt").

Toward the end of 1999, Nancy filed a petition for dissolution of marriage. Several months later, in late January 2000, Nancy and Charles executed a property settlement agreement that she had drafted (the "Settlement Agreement"). Section 2.2 of the Settlement Agreement pertained to the Residence:

> The marital residence and contiguous real estate located at 8307 Mud Creek Rd., Indianapolis, IN 46256 is encumbered by a mortgage. The Residence shall be sold and at closing to be released from lien and all fees related to the sale to be paid in full. Husband and Wife shall divide equally the profit from the sale of said Residence.

Appellant's Appendix at 150. On February 2, 2000, the dissolution court entered a decree dissolving the parties' marriage and disposing of the marital estate pursuant to the terms of the Settlement Agreement. On February 16, 2000, two weeks after the dissolution court entered its decree, Charles suffered a heart attack and died. On July 7, 2000, Nancy filed an affidavit with the Marion County Recorder's office that acknowledged the Debt and stated that "George Best and Eleanor Best have a lien against the property as security for the Debt." Id. at 156.

On November 14, 2000, Nancy sold the residence for $270,000. At the closing, Nancy used the proceeds from the sale to pay the $148,367.19 balance on the mortgage[1] and $4,084 in closing costs. Nancy also directed the title company to pay the Debt, leaving her with $22,308.81. On December 18, 2000, Nancy issued a check payable to Scott McDonough, Charles's brother and the Estate's personal representative, for $10,374.41.[2] The bottom of the check stated, "½ House profits 8307 Mud Creek Rd Estate of Charles McDonough." Plaintiff's Exhibit 9.

On August 15, 2002, the Estate filed a complaint for damages against Nancy and George alleging fraud and breach of the Settlement Agreement. On June 16, 2003, the trial court consolidated the Estate's case with three claims Nancy had filed with the probate court in June 2000 seeking reimbursement from the Estate for the payment of funeral, burial, and medical expenses, as well as expenses related to Charles's business. On May 22, 2006, the trial court conducted a bench trial during which it received documentary evidence and heard testimony from Nancy and George. On August 4, 2006, the trial court made the following findings:

> The court . . . finds that a Decree of Dissolution of Marriage between [Charles] and [Nancy] . . . provided that "The marital residence . . . is encumbered by a mortgage. The Residence shall be sold and at [. . .] closing to be released from lien and all fees related to the sale to be paid in full. Husband and Wife shall divide equally the profit from the sale of said Residence."

[1] The initial balance on the mortgage loan was $104,000. Although the record does not indicate why the balance at closing exceeded this amount, Nancy presumably refinanced in excess of the initial balance at some point.

[2] Nancy testified she issued the check because the probate court responsible for Charles's estate ordered her to do so. The record, however, does not indicate why the probate court ordered Nancy to pay this amount. The record also does not indicate whether the Estate cashed the check.

> The work for which [George] was paid out of the closing was all performed before the dissolution of marriage, and some was even performed before the parties' marriage. The Residence was marital property and was disposed by the Decree. If the obligation to repay existed between [Nancy] and her father, [George], she should have addressed that debt in the dissolution proceedings. It is unknowable if, in fact, this debt was considered in the distribution of marital property. However, after the divorce proceedings [it] was too late to put a lien on the house that would affect [Charles's] share of the property. Therefore, the Court finds that the Estate . . . is entitled to one-half of the profit from the sale of the Residence after deducting the mortgage and all fees related to the sale. Mr. Best's "lien" shall not be deducted from the sale price prior to calculating the profit to be split equally with the Estate.

Appellant's App. at 10 (emphasis in original). Based on these findings, the trial court entered the following judgment:

> Therefore, the Court finds that the [Estate] is entitled to a judgment against . . . [Nancy] . . . in the sum of $47,620.00 plus prejudgment interest from November 14, 2000 to the date of this judgment in the sum of $21,807.18 for a total judgment of $69,427.18. [George] owes no money to the [Estate].
>
> The Court further finds for Nancy . . . and against the Estate . . . on [her claims] and finds that the Estate is indebted to [Nancy] in the sum of $16,386.00. After setoff of the amounts owed by the Estate . . . to [Nancy], the Court finds that judgment shall be entered in favor of the [Estate] and against Nancy . . . in the sum of $53,041.18, plus costs.

Id. at 10-11 (emphasis in original). Nancy now appeals.

Discussion and Decision[3]

I. Standard of Review

In cases such as this one where the trial court issued sua sponte findings of fact and conclusions of law, we apply the following standard of review:

> Under such circumstances, the findings and judgment are not to be set aside unless clearly erroneous, and due regard is to be given to the trial court's ability to assess the credibility of the witnesses. A judgment is clearly erroneous when there is no evidence supporting the findings or the findings fail to support the judgment and when the trial court applies the wrong legal standard to properly found facts. While findings of fact are reviewed under the clearly erroneous standard, appellate courts do not defer to conclusions of law, which are reviewed de novo. Where we are faced with mixed issues of fact and law, we apply an abuse of discretion standard. To determine that a finding or conclusion is clearly erroneous, we must be left with the firm conviction that a mistake has been made.
>
> A trial court's findings control only the issues they cover, and we will apply a general judgment standard to any issues about which the court did not make findings. We may affirm a general judgment based on any legal theory supported by the evidence.

Piles v. Gosman, 851 N.E.2d 1009, 1012 (Ind. Ct. App. 2006) (citations and quotation marks omitted).

II. Settlement Agreement

Nancy argues the trial court erred when it interpreted the term "profit" in the Settlement Agreement to mean proceeds from the sale of the Residence less liens and closing costs. Instead, Nancy contends that "profit" means "proceeds less costs," appellant's brief at

[3] The Estate points out that Nancy's initial brief did not state the standard of review and cited to an unpublished memorandum decision from this court, and Nancy concedes as much. Based on these violations of our appellate rules, the Estate urges us to conclude that Nancy has waived her right to argue the issues raised on appeal because "[w]hile effectively defaulting [Nancy] for failure to comply with the rules may seem unfair, it would seem that excusing two failures in the same appellate brief would be even more unfair to the [Estate]." Appellee's Brief at 6. Although "[d]ismissing an appeal may be warranted where an appellant fails to substantially comply with the appellate rules," Novatny v. Novatny, 872 N.E.2d 673, 677 (Ind. Ct.

5, and that "proceeds" and "costs" include the following:

Proceeds:		$270,000
Costs:		
	Purchase Price	$130,000
	Closing Costs at Purchase	$3,209
	Costs at Sale	$4,048
	Third Party Labor and Materials	$95,482
	George's Labor	$76,638
Total Costs:		$309,378
Profit (Loss):		$(39,378)

See also Defendants' Exhibit I (chart displaying substantially similar figures and stating a loss of $39,378.02); tr. at 82 (Nancy's testimony stating that Defendants' Exhibit I is a summary of her testimony). Thus, Nancy contends the sale of the Residence resulted in a $39,378 loss and the Estate is responsible for half of that amount. The Estate counters that there is no need to interpret "profit" because Section 2.6 of the Settlement Agreement states that Nancy "shall pay any debts in her name" and that Charles "shall pay any debts in his name." Appellant's App. at 151. Citing Nancy's admission that she alone owed the Debt, see transcript at 111-12, the Estate argues the Debt should be disposed of under Section 2.6 of the Settlement Agreement.

The trial court's findings of fact do not explicitly state how it interpreted the meaning of "profit" in Section 2.2 of the Settlement Agreement. Nevertheless, implicit in the trial court's findings are two important interpretations it made with regard to Section 2.2 as a whole: 1) "profit" means proceeds from the sale less any liens and fees related to the sale;

App. 2007), we do not think Nancy's violations rise to this level. Thus, we decline the Estate's invitation and elect to address Nancy's appeal on the merits.

and 2) the Debt was neither a "lien" nor a fee "related to the sale" within the meaning of Section 2.2. Because interpretation of a settlement agreement is a question of law, Shorter v. Shorter, 851 N.E.2d 378, 383 (Ind. Ct. App. 2006), we apply a de novo standard of review with respect to this issue, Piles, 851 N.E.2d at 1012.

> In interpreting a settlement agreement, we adhere to the following guidelines:
>
> > Unambiguous terms must be given their plain and ordinary meaning. If the contract is clear and unambiguous, we may not construe the contract or look at extrinsic evidence; rather, we must simply apply the contractual provisions. Terms are not ambiguous merely because the parties disagree about the proper interpretation of the terms. Rather, language is ambiguous only if reasonable people could come to different conclusions about its meaning.

Singh v. Singh, 844 N.E.2d 516, 524 (Ind. Ct. App. 2006) (citations omitted). Moreover, if a provision is ambiguous, we may consider extrinsic evidence to discern its meaning, Shorter, 851 N.E.2d at 383, but construe any ambiguity against the drafting party, see Daffron v. Snyder, 854 N.E.2d 52, 57 n.4 (Ind. Ct. App. 2006), aff'd on reh'g, 856 N.E.2d 1245.

Reasonable people could not come to different conclusions regarding the meaning of Section 2.2. The first sentence states that the Residence "is encumbered by a mortgage." Appellant's App. at 150. The second sentence states that the Residence "shall be sold" and that the lien and "fees related to the sale" shall be paid. Id. The third sentence states that Nancy and Charles shall "divide equally the profit from the sale of said Residence." Id. Construing Section 2.2 as a whole, the only reasonable way to interpret "profit" as used in the final sentence is in relation to the preceding sentence; that is, "profit" means whatever is left over after the "lien" and "fees related to the sale" have been paid. This interpretation conforms to the general definition of profit as "[t]he excess of revenues over expenditures in

a business transaction," Black's Law Dictionary 1246 (8th ed. 2004), which also recognizes that profit can be calculated only after determining which revenues and expenditures were part of the transaction.

This interpretation means the Debt should have been included in determining profit if it was either a lien or a fee related to the sale of the Residence. Nancy does not argue the Debt was a lien. Instead, Nancy argues the Debt was a fee related to the sale of the Residence. However, construing the Debt as such renders the term "related to the sale" meaningless. See Johnson v. Dawson, 856 N.E.2d 769, 773 (Ind. Ct. App. 2006) ("We attempt to construe contractual provisions so as to harmonize the agreement . . . and so as not to render any terms ineffective or meaningless."). A portion of the Debt was based on Eleanor's loan to Nancy, and the remainder was based on George's labor and expenses. These debts accrued in September 1990 and December 1998, respectively. See Appellant's App. at 158 (expense report indicating that Eleanor's loan was used as a down payment on the Residence at the September 14, 1990, closing); tr. at 118 (George's testimony that by December 1998, "essentially the majority [of the work] was done" and that "a few odd jobs" remained). In light of the dates upon which these debts accrued, interpreting the Debt as a fee within the meaning of Section 2.2 would disregard the limitation that such fees must be "related to the sale." Indeed, if Eleanor's loan is interpreted as a fee "related to the sale" of the Residence, there is no reason to exclude other fees, such as mortgage interest and property taxes, that were incurred during Nancy's ten-year period of ownership.

We conclude the Debt is not a fee related to the sale of the Residence within the meaning of Section 2.2. Thus, it follows that the trial court properly concluded the Debt

should not have been subtracted from the sale price in determining the Estate's share from the sale of the Residence.

III. Prejudgment Interest

Nancy argues the trial court erred when it awarded the Estate prejudgment interest and when it refused to award prejudgment interest on her claims against the Estate. "[T]he purpose of prejudgment interest is to compensate a party for having been deprived of the use of money . . . ." Koppers Co., Inc. v. Inland Steel Co., 498 N.E.2d 1247, 1256 (Ind. Ct. App. 1986). An award of prejudgment interest is considered proper if the damages may be ascertained as of a particular time and the trier of fact need not exercise its judgment to assess the amount of damages. Noble Roman's, Inc. v. Ward, 760 N.E.2d 1132, 1140 (Ind. Ct. App. 2002). Stated differently, "[a]n award of prejudgment interest is proper only where a simple mathematical computation is required. Damages that are the subject of a good faith dispute cannot allow for an award of prejudgment interest." Bopp v. Brames, 713 N.E.2d 866, 872 (Ind. Ct. App. 1999), trans. denied. We review the trial court's award of prejudgment interest for an abuse of discretion. Clark v. Hunter, 861 N.E.2d 1202, 1208 (Ind. Ct. App. 2007).

The trial court determined the Estate was entitled to $47,620 from the sale of the Residence.[4] Nancy argues that awarding prejudgment interest on this amount was improper

[4] We do not know how the trial court arrived at this number. The closing statement states a sale price of $270,000; closing costs of $4,084; and a mortgage balance of $148,367.19. Subtracting these expenses from the sale price would have resulted in $117,548.81 from the sale, half of which, $58,774.41, should have gone to the Estate. The record also indicates Nancy issued the Estate a check for $10,374.41 approximately one month after the sale, although it is unclear whether the Estate cashed it. Assuming the Estate did cash the

because "the trial court was required to exercise its judgment in [its] interpretation of the term 'profit.'" Appellant's Br. at 5. This argument overlooks that determining which items are included as damages and which are not does not constitute the exercise of judgment so as to preclude a prejudgment interest award. See J.S. Sweet Co., Inc. v. White County Bridge Comm'n, 714 N.E.2d 219, 225 (Ind. Ct. App. 1999). After determining the Debt was not properly included as a lien or a fee related to the sale of the Residence, all the trial court had to do to determine the Estate's share was to subtract the mortgage and closing costs and award the Estate half of that amount. Because determining this amount involved a series of simple mathematical computations, and not the exercise of judgment, it follows that the trial court did not abuse its discretion in awarding prejudgment interest to the Estate.

Although the trial court did not abuse its discretion in awarding the Estate prejudgment interest, the trial court also should have awarded Nancy prejudgment interest on her claims against the Estate. The trial court awarded $21,807.18 in prejudgment interest, which it calculated by taking the Estate's share, $47,620, and applying an eight percent annual rate of interest to that amount from the date of the sale, November 14, 2000, to the date judgment was entered, August 4, 2006. From the sum of the Estate's share and the prejudgment interest award, $69,427.18, the trial court subtracted the sum of Nancy's three claims, $16,386, resulting in a judgment in favor of the Estate in the amount of $53,041.18.

By subtracting Nancy's claims from the sum of the Estate's share and its prejudgment interest award, the trial court contravened the purpose of prejudgment interest, "to

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check, subtracting it from $58,774.41 yields $48,400, but that amount is still $780 more than the amount the trial court determined Nancy owed to the Estate. Regardless, because the Estate does not argue the trial court improperly calculated its share, we will assume $47,620 is the correct amount.

compensate a party for having been deprived of the use of money." Kopper's Co., Inc., 498 N.E.2d at 1256. Because the Estate owed Nancy when she filed her claims in June 2000, the Estate was not deprived of the use of that money; Nancy was. Thus, the trial court should have awarded Nancy prejudgment interest on her first claim from the date she filed it, June 23, 2000, to the date the Estate was entitled to its share from the sale of the Residence, November 14, 2000. The trial court also should have awarded Nancy prejudgment interest on her second and third claims from the date she filed them, June 28, 2000, to November 14, 2000. The trial court then should have taken the sum of these awards and added them to the sum of Nancy's three claims. This amount should have been subtracted from the sum of the Estate's share, $47,620, plus prejudgment interest on that share from November 14, 2000, to the date the trial court entered judgment, August 4, 2006. The resulting difference constitutes the amount for which judgment should have been entered. This approach is more consistent with the purpose of a prejudgment interest award.[5]

Conclusion

The trial court properly entered judgment in favor of the Estate. However, although the trial court's decision to award prejudgment interest to the Estate was proper, we reverse and remand with instructions to recalculate the judgment in a manner consistent with this

[5] We recognize there is authority for the proposition that it is error for a trial court to award prejudgment interest to a party who secures no net recovery. See Willie's Constr. Co., Inc. v. Baker, 596 N.E.2d 958, 964 (Ind. Ct. App. 1992); Koppers Co., Inc., 498 N.E.2d at 1256. Those cases, however, concerned claims arising from the same contract. See Koppers Co., Inc., 498 N.E.2d at 1256 n.7 (explaining that because the claims arise from the same contract, "we exclude from consideration here what the rule should be where the counterclaim involves a purely collateral claim"). Thus, it is consistent with the purpose of prejudgment interest to award Nancy on her claims up to the point the Estate was entitled to its share from the sale of the residence because Nancy was deprived of the use of her money during that time.

opinion because the trial court also should have awarded prejudgment interest to Nancy on her claims against the Estate.

Affirmed in part, reversed in part, and remanded.

KIRSCH, J., and BARNES, J., concur.